## SURUHANJAYA PILIHAN RAYA & ORS v. KERAJAAN NEGERI SELANGOR & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
ABDUL RAHMAN SEBLI JCA
KAMARDIN HASHIM JCA
[CIVIL APPEALS NO: W-01(IM)-135-04-2017 &
W-01(IM)-136-04-2017]
17 AUGUST 2017

***CIVIL PROCEDURE:*** *Discovery – Discovery of documents – Allegation that Election Commission used defective electoral roll – Application for discovery of database – Whether application for discovery predicated on issues involved in case – Whether application for discovery necessary and relevant to hearing – Whether documents in Election Commission's possession*

***EVIDENCE:*** *Cross-examination – Cross-examination of deponent of affidavit – Whether truth of averment in affidavit challenged – Whether issues of fact identified – Whether disputed fact relevant to issue to be decided – Whether limited to that issue only – Whether cross-examination would advance cause of justice – Whether there was sufficient evidence or contemporaneous documents to enable court to properly decide without need for cross-examination – Whether prayer for cross-examination ought to be allowed*

The first appellant, the Election Commission ('the EC'), published a notice under s. 4 of the Thirteenth Schedule to the Federal Constitution ('the notice') which set in motion the delimitation of constituencies in Malaysia, as reviewed by the EC in 2016. According to the Selangor Government ('the respondent'), the EC acted contrary to law, unconstitutionally, unreasonably and irrationally when it carried out the 2016 delimitation exercise by using a defective electoral roll which did not contain the addresses of 136,272 Selangor voters ('the voters'). This prompted the respondent to file an application for judicial review at the High Court, seeking, *inter alia*, for (i) a *certiorari* order to quash the notice; and (ii) a *mandamus* order to compel the EC to publish a new notice and new proposed recommendations which complied, *inter alia*, with the Thirteenth Schedule and to take into account the correct and updated addresses of the voters. Before the judicial review application was heard by the High Court, the respondent applied for discovery for, *inter alia*, the database of (i) the voters' addresses ('prayer 1A(i)'); and (ii) the locality code and name of the voters ('prayer 1A(iii)'). In the same notice of application, the respondent also applied to cross-examine the second appellant, the Chairman of the EC ('the Chairman'), on the affidavit that he filed in opposing the application for judicial review. The High Court dismissed prayer 1A(i) and allowed prayer 1A(iii). Hence the

present appeals. The appellants appealed against the order for discovery. The respondent did not proceed with its appeal against the dismissal of prayer 1A(i) but only wished to defend the High Court Judge's decision in respect of prayer 1A(iii) granted in its favour and to pursue its appeal against the decision to disallow cross-examination of the Chairman.

**Held (allowing appeal by appellants; dismissing appeal by respondent) Per Abdul Rahman Sebli JCA delivering the judgment of the court:**

**(1)** By abandoning its appeal in respect of prayer 1A(i), the respondent must now be taken to accept that the addresses of the voters were not necessary for the purpose of the judicial review hearing. In other words, discovery of the addresses was not necessary. (para 22)

**(2)** The missing addresses did not even qualify as a dispute, let alone a serious dispute on an important question of fact that warranted discovery of the locality code and the name of the voters that the EC used in carrying out the 2003 and 1994 delimitation exercises. The addresses were not in the EC's possession and the respondent itself confirmed that it did not need the addresses for the hearing. It was therefore futile to argue that the locality code and name of the voters used during the 2003 and 1994 delimitation exercises would provide valuable information that may prove or disprove either party's contentions at the hearing. Consequently, it was unnecessary for an order of discovery to be made. Furthermore, it had not been shown that the EC was required by law to keep the locality code and the name after the voters had been assigned their localities at the point of registration. (paras 73, 74, 75 & 76)

**(3)** The discovery process must be predicated on the issues involved in a particular case. The application for discovery in this case was clearly not predicated on the issue involved, which was whether the missing addresses had tainted the 2016 delimitation exercise, given that prayer 1A(i) had been withdrawn. The law further requires that the documents sought to be required must be in the other party's possession before an order for discovery could be issued. Since the locality code and name for the 2003 and 1994 delimitation exercises were not in the EC's possession, the High Court was in no position to allow prayer 1A(iii). (paras 77 & 78)

**(4)** Given the facts of the case, all that the High Court need to resolve at the hearing was purely a question of law *ie,* whether the application for judicial review ought to be allowed on the ground that the EC acted contrary to law, unconstitutionally, unreasonable and irrationally when it carried out the 2016 delimitation exercise by using a defective electoral roll in that it did not contain the addresses of the voters. (para 82)

**(5)** The application to cross-examine must satisfy three primary considerations, namely (i) the truth of the averment in the affidavit must be challenged or the issues of fact identified; (ii) the disputed fact was relevant to the issue to be decided and must be limited to that issue only; and (iii) cross-examination would not advance the cause of justice and should be refused if there was sufficient evidence or contemporaneous documents to enable the court to properly decide without the need for cross-examination. Having regard to the principles applicable, the High Court Judge was right in disallowing the prayer for cross-examination. (para 94)

***Bahasa Malaysia*** *Headnotes*

Perayu pertama, Suruhanjaya Pilihan Raya ('SPR'), menerbitkan notis bawah s. 4 Jadual Ketiga Belas Perlembagaan Persekutuan ('notis') yang menggerakkan penyempadanan kawasan pilihan raya di Malaysia, seperti yang disemak oleh SPR pada 2016. Menurut Kerajaan Negeri Selangor ('responden'), SPR bertindak bertentangan dengan undang-undang, tidak berperlembagaan, tidak munasabah dan tidak rasional apabila menjalankan langkah penyempadanan pada 2016 dengan menggunakan daftar pemilih yang cacat yang tidak mengandungi alamat 136,272 pengundi Selangor ('pengundi-pengundi'). Ini mendorong responden memfailkan satu permohonan semakan kehakiman di Mahkamah Tinggi bagi, antara lain, (i) perintah *certiorari* membatalkan notis tersebut; dan (ii) perintah *mandamus* memaksa SPR menerbitkan notis baharu dan cadangan-cadangan baharu yang mematuhi, antara lain, Jadual Ketiga Belas dan mengambil kira alamat-alamat pengundi-pengundi yang betul dan terkemas kini. Sebelum permohonan semakan kehakiman dibicarakan oleh Mahkamah Tinggi, responden memohon penzahiran, antara lain, pangkalan data (i) alamat pengundi-pengundi ('permohonan 1A(i)'); dan (ii) kod dan nama ketempatan pengundi-pengundi ('permohonan 1A(iii)'). Dalam notis permohonan yang sama, responden juga memohon untuk memeriksa balas perayu kedua iaitu Pengerusi SPR ('Pengerusi') tentang afidavit yang beliau failkan untuk menentang permohonan semakan kehakiman. Mahkamah Tinggi menolak permohonan 1A(i) dan membenarkan permohonan 1A(iii). Maka timbul rayuan-rayuan ini. Perayu-perayu merayu terhadap perintah penzahiran. Responden tidak meneruskan dengan rayuannya terhadap penolakan permohonan 1A(i) tetapi hanya ingin mempertahankan keputusan Hakim Mahkamah Tinggi berkenaan permohonan 1A(iii) yang memihak padanya dan seterusnya meneruskan rayuan terhadap keputusan dalam membenarkan pemeriksaan balas Pengerusi.

**Diputuskan (membenarkan rayuan perayu-perayu; menolak rayuan responden)**

**Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:**

**(1)** Dengan mengabaikan rayuan terhadap permohonan 1A(i), responden mestilah dianggap telah menerima bahawa alamat pengundi-pengundi tidak diperlukan bagi tujuan perbicaraan semakan kehakiman. Dalam erti kata lain, penzahiran alamat-alamat tidak lagi diperlukan.

**(2)** Alamat-alamat yang hilang tidak tergolong sebagai pertikaian, apatah lagi menjadi pertikaian serius persoalan penting fakta yang mewajarkan penzahiran kod dan nama ketempatan pengundi-pengundi yang SPR gunakan dalam penjalanan langkah-langkah penyempadanan pada 2003 dan 1994. Alamat-alamat ini tiada dalam milikan SPR bahkan responden sendiri mengesahkan tidak memerlukan alamat-alamat ini untuk perbicaraan. Maka sia-sia sahaja untuk menghujahkan kod dan nama ketempatan pengundi-pengundi yang digunakan dalam langkah-langkah penyempadanan 2003 dan 1994 akan membekalkan maklumat bernilai yang boleh membuktikan atau menyangkal hujahan pihak-pihak semasa perbicaraan. Oleh itu, perintah penzahiran tidak perlu dibuat. Tambahan lagi, tidak dibuktikan bahawa SPR berkewajipan, bawah undang-undang, untuk menyimpan kod dan nama ketempatan selepas pengundi-pengundi diagihkan mengikut ketempatan mereka.

**(3)** Proses penzahiran mestilah berdasarkan isu-isu yang terlibat dalam satu-satu kes. Permohonan penzahiran dalam kes ini jelas bukan berdasarkan isu yang terlibat iaitu sama ada alamat-alamat yang hilang mencacatkan langkah penyempadanan pada 2016 kerana permohonan 1A(i) ditarik balik. Undang-undang seterusnya mengkehendaki agar dokumen-dokumen yang dipohon mestilah dalam milikan pihak satu lagi sebelum perintah penzahiran boleh dikeluarkan. Oleh kerana kod dan nama ketempatan bagi langkah-langkah penyempadanan 2003 dan 1994 bukan dalam milikan SPR, Mahkamah Tinggi tidak boleh membenarkan permohonan 1A(iii).

**(4)** Melihat pada fakta kes, Mahkamah Tinggi hanya perlu menyelesaikan persoalan undang-undang sahaja semasa perbicaraan iaitu sama ada permohonan semakan kehakiman wajar dibenarkan atas alasan SPR bertindak bertentangan dengan undang-undang, tidak berperlembagaan, tidak munasabah dan tidak rasional apabila menjalankan langkah-langkah penyempadanan pada 2016 dengan menggunakan daftar pemilih yang cacat yang tidak mengandungi alamat pengundi-pengundi.

**(5)** Permohonan untuk memeriksa balas mesti memenuhi tiga pertimbangan utama, khususnya (i) kebenaran penegasan dalam afidavit mesti dicabar atau isu-isu fakta telah dikenal pasti; (ii) fakta yang dipertikaikan relevan dengan isu yang perlu diputuskan dan mesti terhad pada isu tersebut sahaja; dan (iii) pemeriksaan balas tidak menjangkau kausa keadilan dan akan ditolak jika terdapat cukup keterangan atau dokumen-dokumen semasa untuk membolehkan mahkamah memutuskan dengan betul tanpa perlu melakukan pemeriksaan balas. Berdasarkan prinsip-prinsip terpakai, Hakim Mahkamah Tinggi bertindak betul dalam menolak permohonan pemeriksaan balas.

**Case(s) referred to:**

*ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors [2013] 1 LNS 99 CA* ***(refd)***

*Kerajaan Negeri Kelantan v. Petroliam Nasional Bhd & Other Appeals [2014] 7 CLJ 597 FC* ***(refd)***

*Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors [2009] 5 MLJ 40* ***(refd)***

*O'Reilly v. Mackman [1983] 2 AC 237* ***(refd)***

*Paruvathy Palany v. Sathiasealan Govindasamy [1999] 6 CLJ 113 HC* ***(refd)***

*R (Quark Fishing Ltd) v. Secretary of State for Foreign Affairs and Commonwealth Affairs [2002] EWCA Civ 1409* ***(refd)***

*Ratnam v. Cumarasamy & Anor [1964] 1 LNS 237 PC* ***(refd)***

*Rekapacific Bhd v. Securities Commission & Anor And Other Appeals [2005] 2 CLJ 108 CA* ***(refd)***

*Tetuan Kumar Jaspal Quah & Aishah v. The Co-operative Central Bank Ltd [2007] 4 CLJ 487 CA* ***(refd)***

*Tun Dr Mahathir Mohamad & Ors v. Datuk Seri Mohd Najib Tun Hj Abdul Razak (No 2) [2017] 8 CLJ 350 HC* ***(refd)***

*Yekambaran Marimuthu v. Melayawata Steel Berhad [1994] 2 CLJ 581 HC* ***(refd)***

**Legislation referred to:**

Elections (Registration of Electors) Regulations 2002, reg. 10
Federal Constitution, art. 119, Thirteenth Schedule s. 4
Rules of Court 2012, O. 24 rr. 12, 13, O. 53 rr. 3(2), 6

*For the appellants - Amarjeet Singh Serjit Singh, Alice Loke Yee Ching, Azizan Md Arshad, Nik Azrin Zairin Nik Abdullah & Shaiful Nizam Shahrin; SFCs*

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*[Editor's note: For the High Court judgment, please see Kerajaan Negeri Selangor v. Suruhanjaya Pilihan Raya Malaysia [2017] 6 CLJ 82 (overruled in part).]*

*Reported by Najib Tamby*

A

## JUDGMENT

**Abdul Rahman Sebli JCA:**

### Introduction

**[1]** There were two appeals before us involving the same parties. The first B appeal was by the Election Commission (first appellant) and its Chairman (second appellant) and Secretary (third appellant) against the following order made by the High Court:

> Responden-Responden akan dalam masa 14 hari selepas penyampaian servis kepadanya Perintah ini untuk menzahirkan kod dan nama lokaliti C dalam format "database format of Microsoft Access" untuk 136,272 pengundi-pengundi yang dirujuk dalam perenggan 58 dan Ekshibit MAA-12 Afidavit Sokongan Pemohon yang diikrarkan oleh Mohamed Azmin bin Ali pada 18 Oktober 2016 (dibaca bersama Appendix 1 yang disimpan dalam cakera padat yang diberikan kepada parti-parti pada 16 Disember 2016) buat 2 latihan kajian semula persempadanan untuk Negeri-Negeri D Tanah Melayu yang lepas iaitu 2003 dan 1994.

**[2]** It was an order to furnish the locality code and locality name of the 136,272 voters for the State of Selangor which the Election Commission used during the 2003 and 1994 delimitation exercises.

E **[3]** The second appeal was by the Government of the State of Selangor against the decision of the same court dismissing its application to cross-examine the Chairman of the Election Commission.

**[4]** For convenience, we shall refer to the appellants in the first appeal collectively as "the Election Commission" and the appellant in the second F appeal as "the Selangor Government".

**[5]** Having heard arguments by both sides, both written and oral, we unanimously allowed the Election Commission's appeal and dismissed the Selangor Government's appeal. We set aside the decision of the High Court allowing discovery of the locality code and locality name of the 136,272 G voters and affirmed the decision to disallow cross-examination of the Election Commission Chairman. No order for costs was made in respect of both appeals. We now provide the grounds for our decision.

### Facts Of The Case

H **[6]** The facts are these. On 15 September 2016, the Election Commission published a notice under s. 4 of the Thirteenth Schedule to the Federal Constitution ("the thirteenth schedule notice") which set in motion the delimitation of constituencies in the States of Malaya as reviewed by the Election Commission in 2016.

I **[7]** On 18 October 2016, the Selangor Government filed an application for judicial review in the High Court at Kuala Lumpur praying, *inter alia*, for the following reliefs:

(a) An order of *certiorari* to quash the thirteenth schedule notice published by the Election Commission; and

(b) An order of *mandamus* to compel the Election Commission to publish a new thirteenth schedule notice and new proposed recommendations which comply *inter alia* with the Thirteenth Schedule to the Federal Constitution and to take into account the correct and updated addresses of the 136,272 voters in the State of Selangor where no addresses are stated.

**[8]** The basis on which the above reliefs were sought was that the Election Commission acted contrary to law, unconstitutionally, unreasonably and irrationally when it carried out the 2016 delimitation exercise by using an electoral roll that was defective in that it did not contain the addresses of approximately 136,272 Selangor voters. This was expressed in ground 7.3 of the statement pursuant to O. 53 r. 3(2) of the Rules of Court 2012 ("the Rules") ("the Order 53 Statement") under the heading "GROUNDS", which reads:

> 7.3 used the electoral roll which is defective as approximately 136,272 voters in the State of Selangor shown on the electoral roll do not have their corresponding addresses entered on the roll. (emphasis added)

**[9]** In her written submissions before us, learned counsel for the Selangor Government summarised the above ground 7.3 as follows:

> 22. Before we proceed, it is pertinent to summarise Ground 3 of the Applicant's judicial review application:
>
> (i) the Election Commission does not possess **the addresses** of at least 136,272 voters in the State of Selangor;
>
> (ii) without **the addresses**, it is open for the Election Commission to arbitrarily assign, maintain or change constituencies of these 136,272 voters in the State of Selangor;
>
> (iii) such arbitrary assignment, maintenance or changing of constituencies for these 136,272 voters **without addresses** is tainted with illegality and cannot be used as a basis for the delimitation in the State of Selangor. (emphasis added)

**[10]** Grounds (ii) and (iii) reflect the Selangor Government's suspicion that the Election Commission had not acted honestly in carrying out the 2016 delimitation exercise. Learned counsel stressed the point when she submitted at para. 24:

> 24. We submit that the correctness of the electoral roll is not an issue in this case – **the heart of the matter is whether the EC could carry out the 2016 Delimitation Exercise when i) the addresses of up to 136,272 voters in the State of Selangor were missing and**/or unknown and/or ii) there is a real possibility that the localities of these 136,272 voters in the State of Selangor have been incorrectly assigned. (emphasis added)

**[11]** Paragraph 17 reads with paras. 18 and 19 of the Selangor Government's affidavit in support affirmed by Mohamed Azmin bin Ali on 13 January 2017 also emphasised on the missing addresses of the 136,272 voters when the Menteri Besar averred:

> 17. I have been advised and verily believe that as a body which collects and compiles voter information, and has conducted both delimitation exercises in 2003 and 1994, the Election Commission is in possession, custody or power of the Locality of 136,271 Voters for the Last 2 Delimitation Exercises.
>
> 18. It is thus imperative and in the interests of justice for this Honourable Court to know whether the localities of these 136,272 voters have changed in the last 2 delimitation exercises to make a determination on whether localities are indeed permanent and would not be changed (as alleged by the Respondents) or have been arbitrarily changed (as alleged by the Applicant).
>
> 19. Such finding would have a direct bearing on Ground 3 in this Application, whereby the issue is whether **the Election Commission has used a flawed electoral roll with missing addresses** (and consequently would result in and cause the arbitrary assignment of voters into localities, polling districts and constituencies) in the State of Selangor for the delimitation process. (emphasis added)

**Premise Of Selangor Government's Case**

**[12]** It is clear beyond peradventure that the whole premise of the Selangor Government's pleaded case against the Election Commission is the missing addresses of the 136,272 voters from the electoral roll. It is the veracity of the electoral roll that the Selangor Government is challenging.

**[13]** The contention was that without the voters' addresses on the electoral roll, it was not possible for the Election Commission to carry out the 2016 delimitation exercise. This is the substratum of the Selangor Government's case against the Election Commission. This is the dispute that it wants the High Court to resolve at the substantive judicial review hearing. Its case must rest or fall on this pleaded ground.

**[14]** What is pertinent to note with regard to ground 7.3 of the Order 53 Statement is that it makes no mention of the locality code and locality name of the 136,272 voters that the Election Commission used in carrying out the 2003 and 1994 delimitation exercises. The non-availability of the locality code and locality name is clearly not a ground for impugning the 2016 delimitation exercise.

**[15]** Ground 8 of the Order 53 Statement sums up the Selangor Government's grievance over the publication of the thirteenth schedule notice, in the following words:

8. Given all the evidence, facts and circumstances of the case, the Election Commission has issued the Notice and the Proposed Recommendations unconstitutionally, unreasonably, irrationally and unfairly. Any other Election Commission similarly circumstanced would not have issued the Notice and the Proposed Recommendations.

**[16]** The application for leave was not opposed by the Election Commission and was duly granted by the Kuala Lumpur High Court on 16 December 2016.

**Discovery And Cross-examination**

**[17]** Having obtained leave and before the substantive judicial review application was heard by the High Court, the Selangor Government *vide* notice of application dated 13 January 2017 applied for the following prayers for discovery:

1(A)(i) the addresses in database format of Microsoft Access of the 136,272 voters referred to in paragraph 58 and Exhibit MAA-12 of the Applicant's Affidavit in Support affirmed by Mohamed Azmin bin Ali on 18.10.2016 (read together with Appendix 1 stored in a compact disc which was handed to parties on 16.12.2016);

1(A)(ii) the voter registration documentation for all the 136,272 voters referred to in paragraph 58 and Exhibit MAA-12 of the Applicant's Affidavit in Support affirmed by Mohamed Azmin bin Ali on 18.10.2016 (read together with Appendix 1 stored in a compact disc which was handed to parties on 16.12.2016), such as the Borang A referred to in Exhibit TF-1 of the Affidavit in Reply of Thomas Fann affirmed on 6.1.2017;

1(A)(iii) the **locality code and locality name** and database format of Microsoft Access of the 136,272 voters referred to in paragraph 58 and Exhibit MAA-12 of the Applicant's Affidavit in Support affirmed by Mohamed Azmin bin Ali on 18.10.2016 (read together with Appendix 1 stored on a compact disc which was handed to parties on 16.12.2016) for the last 2 delimitation exercises for the States of Malaya i.e. 2003 and 1994;

1(B) all reports, minutes and documentation on the steps taken by the Election Commission to implement the recommendations and/or address the issues raised in the 2012 PSC Report, particularly Recommendations 10.5 to 10.7 and 11.1 to 11.3 as found in Exhibit MAA-14 of the Applicant's Affidavit in Support affirmed by Mohamed Azmin bin Ali on 18.10.2016 (at pages 476-477);

1(C) the auditing trail of all voters in the State of Selangor in database format of Microsoft Access which would reflect all changes to voter information to date since registration to become a voter, including the reasons for any such change and when such change had occurred; and

A 1(D) a computer software application built by the Election Commission named the Electoral Geographical Information system used in the delimitation exercise for the State of Selangor. (emphasis added)

**[18]** In the same notice of application, the Selangor Government also applied to cross-examine the Chairman of the Election Commission on the B affidavit that he filed in opposing the application for judicial review, in terms of the following prayers:

(2) Further and/or in the alternatively, for the purpose above, that the Applicant be at liberty to cross-examine the 2nd Respondent upon the affidavit sworn by him and filed on 27.12.2016 by the Respondents for the C purpose of being used as evidence at the hearing of the Applicant's judicial review application herein;

(3) That such cross-examination may be taken at the hearing of the Applicant's judicial review application herein;

(4) That the 2nd Respondent be ordered to attend to be cross-examined D accordingly.

**The High Court's Decision**

**[19]** The High Court delivered its decision on 21 April 2016. The learned judge only allowed prayer 1A(iii) ie, discovery of the locality code and E locality name of the 136,272 voters for the last two delimitation exercises, ie, the delimitation exercises carried out in 2003 and 1994. The rest of the prayers, including the prayers for discovery of the addresses of the 136,272 Selangor voters and for cross-examination of the Election Commission Chairman were disallowed. Hence, the respective appeals by the Election Commission and the Selangor Government.

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**Withdrawal Of Prayers And Its Effect**

**[20]** At the commencement of the hearing of these appeals on 20 July 2017, learned counsel for the Selangor Government informed us that the Selangor Government did not wish to proceed with its appeal against the dismissal of G prayers 1A(i), 1A(ii), 1B, 1C and 1D but only wished to defend the learned judge's decision in respect of prayer 1A(iii) which was granted in its favour, and to pursue its appeal against the decision to disallow cross-examination of the Election Commission Chairman.

**[21]** Prayer 1A(i), it will be recalled, was the prayer asking for discovery H of the addresses of the 136,272 voters. This prayer was crucial and central to the application for judicial review as it relates to a matter that goes to the root of the Selangor Government's case against the Election Commission, namely that the Election Commission acted unlawfully when it carried out the 2016 delimitation exercise by using an electoral roll that did not have the I addresses of the 136,272 voters, as pleaded in ground 7.3 of the Order 53 Statement (para. 8 above).

**[22]** By abandoning its appeal in respect of prayer 1A(i), the Selangor Government must now be taken to accept that the addresses of the 136,272 voters are not necessary for the purposes of the substantive judicial review hearing. In other words, discovery of the addresses is not necessary.

**[23]** If the addresses of the 136,272 voters are not required for purposes of the judicial review hearing, we do not see how it can be argued at the same hearing that they were necessary for purposes of the 2016 delimitation exercise. Thus, even if the High Court were to grant the order of *mandamus* to compel the Election Commission to publish a new thirteenth schedule notice and new proposed recommendations, it will not include an order to take into account the correct and updated addresses of the 136,272 voters.

**[24]** If at all, the Election Commission will only be required to publish a new thirteenth schedule notice and new proposed recommendations, but minus the addresses of the 136,272 voters.

**[25]** In our opinion, the admission by the Selangor Government that the addresses of the 136,272 voters were not necessary for the 2016 delimitation exercise undermines the whole substratum of its case (as pleaded in ground 7.3) that the 2016 delimitation exercise was unlawful for the reason that it was carried out using an electoral roll that did not contain the addresses of the 136,272 voters. It leaves ground 7.3 of the Order 53 Statement without any leg to stand on.

**The Issues And Our Determination**

**[26]** Given the stand now taken by the Selangor Government, there were only two issues left for our determination, namely:

(i) Whether the High Court was right in allowing prayer 1A(iii); and

(ii) Whether the High Court was right in disallowing the cross-examination of the Chairman of the Election Commission.

**[27]** We shall deal with issue (i) first. The locality code and locality name referred to in prayer 1A(iii) is the locality code and locality name of the 136,272 voters that the Election Commission used to carry out the last two delimitation exercises for the States of Malaya, ie, the exercises carried out in 2003 and 1994; events that took place 14 years and 23 years ago respectively, with a gap of nine years in between the two exercises.

**[28]** A locality is a sub-unit of a polling district. Several polling districts then form a State constituency. Several State constituencies in turn form a Parliamentary constituency. In the document titled "Portal Rasmi Suruhanjaya Pilihan Raya Malaysia" handed to us by learned counsel for the Selangor Government during the course of argument, the following information is given with respect to a locality:

**LOKALITI**

Lokaliti adalah komponen paling kecil yang terdapat dalam Bahagian Pilihan Raya. Ia merupakan tempat tinggal sekumpulan orang tempatan yang mempunyai talian sosial yang jelas seperti kampong atau taman perumahan. Dalam urusan pendaftaran pemilih, *lokaliti adalah asas bagi menentukan di mana seorang pemilih akan mengundi. Penentuan tersebut adalah berdasarkan alamat yang dinyatakan dalam kad pengenalan.* (emphasis added)

**[29]** A locality is therefore the basis for the Election Commission to determine the location where the elector is to cast his vote. To determine the locality of a voter, the Election Commission relies on his address at the point of registration, which it obtains from the voter's identity card. According to the Election Commission, the addresses are not important and need not be in its possession because:

(i) Voters have been accurately assigned their corresponding locality at the point of registration based on the addresses shown on their identity cards;

(ii) It is the locality of the voters which is the reference point for the Election Commission to assign, maintain and change constituencies of such voters; and

(iii) The localities of voters will not be changed, unless there is a change of address upon application made by the voters themselves.

**[30]** What this means is that once a voter has been assigned a locality at the point of registration, it is not necessary for the Election Commission to keep his address. The Selangor Government does not seriously dispute the Election Commission's averment that the addresses are not important. What it disputes is the Election Commission's explanation in (i), (ii) and (iii) above.

**[31]** First, explanation (i) and (ii). According to learned counsel, this is not borne out in some cases and in fact admitted by the Election Commission upon being queried on the change of localities of a sample of three voters in the State of Selangor. We were referred to para. 16 of the Election Commission's affidavit in reply no. 2 where the deponent affirmed:

Saya nyatakan bahawa lokaliti telah diubah menurut peraturan 25(3) Peraturan-Peraturan Pilihan Raya (Pendaftaran Pemilih) 2002 kerana kesilapan pendaftaran menyebabkan ketiga-tiga orang diambil sebagai contoh didaftarkan di kawasan yang bukan kawasan pendaftarannya di atas permohonan pemilih tersebut.

**[32]** As for explanation (iii), it was pointed out that this is not accurate as evidenced by:

(i) The change of localities of 23 voters in the Parliamentary Constituency of Klang (P110) due to vague reasons such as "dikeluarkan kerana silap pendataan" and "pembetulan lokaliti". A

(ii) The change of localities of 180 voters were removed from the Parliamentary Constituency of Klang (P110) and 177 voters who were transferred to Kapar. B

(iii) Several other examples of voters in the State of Selangor whose localities have been changed without any change of addresses and application made by the voters themselves.

**[33]** The Selangor Government's "dispute" is therefore over the question whether the voters' localities had been accurately determined by the Election Commission. It was submitted that there is thus a material dispute of fact between the Selangor Government and the Election Commission that requires disclosure of the locality code and locality name of the 136,272 voters that the Election Commission used in carrying out the 2003 and 1994 delimitation exercises. C D

**[34]** The question to ask in relation to this dispute *vis-à-vis* prayer 1A(iii) of the discovery application is whether the issues raised by learned counsel, in particular the mistakes that the Election Commission admitted to have made with regard to the change of localities of some of the voters, constitute serious disputes of fact that necessitated discovery of the locality code and locality name of the 136,272 voters that the Election Commission used in carrying out the 2003 and 1994 delimitation exercises. E

**[35]** It was submitted that they constitute material disputes of fact between the Selangor Government and the Election Commission and that the only way to resolve the disputes was by discovery of the locality code and locality name of the 136,272 voters used during the 2003 and 1994 delimitation exercises. F

**[36]** We were told that if the locality code and locality name of the 136,272 voters for the 2003 and 1994 delimitation exercises are presented before the court at the substantive hearing, the Selangor Government would be able to observe the change of localities of these voters from 1994 up to the present date to ascertain if there is any unusual pattern, which can be evidence of arbitrary and unlawful assignment of constituencies, thus tainting the 2016 delimitation exercise. G H

**[37]** We were also told that the localities of these voters from 1994 to date can also be cross-checked for their accuracy with the record of these voters kept at the National Registration Department, past electoral rolls and other sources. It was submitted that if the localities of this huge group of voters in the State of Selangor are shown to be incorrectly assigned, this would similarly taint the entire 2016 delimitation exercise. I

**[38]** It was submitted that the learned judge had correctly appreciated the relevance and importance of the locality code and locality name of the 136,272 voters for the last two delimitation exercises when His Lordship said:

> [41] In my view, the locality codes for the **addressless voters** in the two previous redelimitation exercises would be valuable information that may prove or disprove either party's contentions. For example, if the information on the locality of the addressless voters establishes that the localities have been correctly recorded by reference to the current records for that voter at the National Registration Department, then it could not be said that the redelimitation exercise was flawed by reason of **reliance on an electoral roll that did not contain the addresses of the 136,272 voters.**
>
> [42] Of course, the mere fact that a voter's locality does not match his or her current address does not necessarily mean that the electoral roll is flawed, for the residency of a voter in the electoral roll is only changed if the voter makes an application to change his constituency. Nonetheless, if the locality code can be shown to have somehow been incorrectly recorded – whether by reason of the division of locality over time or otherwise – then the applicant's case for review is made stronger.
>
> [43] I was therefore of the view that the discovery of the locality codes was necessary for the fair disposal of the substantive application. (emphasis added)

**[39]** Learned counsel further submitted that the learned judge rightfully took into account the constitutional importance of the judicial review application when he took an expansive view of the documents:

> [46] What is relevant and necessary for the fair disposal for the substantive application is to be ascertained from the surrounding circumstances of the case, including the nature of the proceedings: see para. 30, *ante*. In my view, if the challenge relates to a fundamental and constitutionally-guaranteed right, such as the right to vote, or the right to free and fair elections, the court would be entitled to take an expansive view of the documents would be necessary for the fair disposal of the challenge. This is an embodiment of the principle that the intensity of review in a public law case will depend on the subject matter at hand (per Laws LJ in *R v. Secretary of State for the Home Department ex p. Mahmood*). In the words of Lord Steyn, in law context is everything.

**[40]** The first thing to note with regard to the learned judge's description of the 136,272 voters as being "addressless" is that it is factually wrong, and we say this with all due respect to the learned judge. The truth, as explained by the Election Commission, is that at the point of registration, the addresses of these 136,272 voters actually existed and were in fact taken from their identity cards, but once their localities were assigned, the Election Commission did not keep them as it was not necessary to do so.

**[41]** As we have alluded to earlier, with the withdrawal of prayer 1A(i), the Selangor Government is deemed to accept that it is unnecessary for the Election Commission to furnish the addresses of the 136,272 voters. Further, the Election Commission has explained that the localities of the voters will not be changed, unless there are changes of address upon application made by the voters themselves.

**[42]** Most importantly, there is no evidence that any of the 136,272 voters had applied to change their localities. Therefore, the Selangor Government's assertion that "there is a real possibility that the localities of these 136,272 voters in the State of Selangor have been incorrectly assigned" (see para. 10 above) is baseless.

**[43]** At para. 41 of the grounds of judgment, the learned judge made references to the addresses of the 136,272 voters. It is obvious that the address factor weighed heavily in His Lordship's mind. This is perfectly understandable as the learned judge was considering whether to grant prayer 1A(i), ie, discovery of the addresses.

**[44]** But with the withdrawal of prayer 1A(i) by the Selangor Government in these appeals, the issue of the missing addresses has become completely irrelevant. In our view, the effect of the withdrawal is to knock out Selangor Government's pleaded case that the Election Commission acted contrary to law, unconstitutionally, unreasonably and irrationally when it carried out the 2016 delimitation exercise by using a defective electoral roll that did not contain the addresses of the 136,272 voters. This has to be so because the whole basis of the Selangor Government's case against the Election Commission rests on the missing addresses, as pleaded in ground 7.3 of the Order 53 Statement.

**Inconsistency Of The Respondent's Position**

**[45]** However, in spite of the abandonment of prayer 1A(i), learned counsel persisted in her argument that it was necessary for the Election Commission to have the addresses of the 136,272 voters to carry out the 2016 delimitation exercise. At one point in her argument, learned counsel candidly told us that the Selangor Government does not need the addresses, but this is inconsistent with the main thrust of her argument, as can be seen from the following submissions before us:

> We say you need the addresses to delimit. Refer to Jilid 2(a) page 233. They could not have done the delimitation exercise without the addresses. Refer to Article 119 of the Constitution – Tab 1 orange bundle. The right to vote is tied to your address. That is the document that they have destroyed. Refer to Jilid 2(a) page 99. Judge asked the question.
>
> We want to see whether the locality code has changed. Refer to the judge's order – Bahagian A Jilid 1 page 16. Order No. 1. We are not asking for the addresses. We only ask for the code for 2003 and 1994 for the 136,272 voters.

**[46]** In fact, it was strenuously argued that if the Election Commission were to deal only with locality and not the addresses, it would be relying on vague information which, according to learned counsel, would place the Selangor Government in the unenviable position of not knowing where exactly the 136,272 voters live.

**[47]** Clearly, the focus of the argument was still on the missing addresses of the 136,272 voters, which was exactly how the case was presented in the High Court, as can be seen from learned counsel's submissions at p. 106 Jilid 2A of the appeal record:

> No. 2 My Lord, we are actually questioning the delimitation exercise. *What we are saying is, they ought to base their delimitation exercise on the addresses. Not on the locality that you assigned ages ago and which may have changed and where we have shown there are errors. That's the point we are making here.* That … it is vital that you do that because as I've shown My Lord, when the population grows, localities can change. *Addresses remain the same but you then know where to place them. So that's why we say it is critical.* So here My Lord, they are saying that you can't question the roll. No. 1, I disagree with that. But in any event My Lord, what we are saying here is you based your delimitation exercise on the wrong basis. *That without addresses you cannot do this delimitation exercise.* (emphasis added)

**[48]** The third sentence above clearly suggests that the localities assigned to the 136,272 voters which the Election Commission used for the 2003 and 1994 delimitation exercises were not needed for the 2016 exercise. To drive home the point that the right to vote is tied to the addresses of the voters, we were referred to art. 119 of the Federal Constitution.

**[49]** But this position has been overtaken by events and is history with the withdrawal of prayer 1A(i). It is therefore not open to the Selangor Government to now resurrect the issue of missing addresses. The position is no longer tenable. The Selangor Government's position after the withdrawal of prayer 1A(i) is the same as if it had never applied for discovery of the addresses of the 136,272 voters. The factual basis on which ground 7.3 of the Order 53 Statement is based is gone.

**[50]** It is abundantly clear that the Selangor Government's case now and then was that the impugned 2016 delimitation exercise was unlawful for only one reason, and that is, the electoral roll did not have the addresses of the 137,272 voters.

**[51]** Now that the missing addresses of the 136,272 voters are no longer relevant and no longer needed for the substantive hearing, we do not think it is permissible for the Selangor Government to blow fire and ice over the issue, in one breadth accepting that the addresses were not necessary for the 2016 delimitation exercise, yet in the next saying that they were needed to carry out the exercise.

**[52]** For the same reason, the Selangor Government cannot now be heard to say that the High Court was right in allowing for discovery of the locality code and locality name of the 136,272 voters, given the fact that the locality code and locality name of the 136,272 voters is tied to the addresses of these voters which, as explained by the Election Commission, were obtained from their identity cards at the point of registration and which were then used to determine their localities.

**[53]** If, as implicitly admitted by the Selangor Government that the addresses are not necessary for purposes of the judicial review application (and by extension the 2016 delimitation exercise itself), then the fact that the addresses were not on the electoral roll cannot now be used as a ground to say that the 2016 delimitation exercise was not carried out in accordance with the law.

**The Real Issue In Dispute**

**[54]** It is important to always keep in mind that the real dispute between the Selangor Government and the Election Commission is over the missing addresses of the 136,272 voters. This, we reiterate, is the factual ground on which the Selangor Government sought to quash the thirteenth schedule notice published by the Election Commission, as contained in ground 7.3 of the Order 53 Statement. None of the other pleaded grounds has the same importance and impact as the issue of the missing addresses.

**[55]** The missing addresses is the core issue and the whole basis for the Selangor Government's case against the Election Commission. It must not be blurred by learned counsel's statement from the bar table that what the Selangor Government needs now is only the locality code and locality name of the 136,272 voters that the Election Commission used during the 2003 and 1994 delimitation exercise, and not their addresses.

**[56]** On the facts and the pleaded case, there can be no argument that the Selangor Government relied entirely on the missing addresses to support prayer 1A(iii), ie, for discovery of the locality code and locality name of the 136,272 voters that the Election Commission used for the 2003 and 1994 delimitation exercises.

**[57]** In the course of the hearing of these appeals and as the argument turned on the locality code and locality name of the 136,272 voters, the learned Senior Federal Counsel Dato' Amarjeet Singh informed the court that the Election Commission does not have the locality code for the 2003 and 1994 delimitation exercises.

**[58]** This, according to Dato' Amarjeet Singh, was due to the fact that the 1994 electoral roll does not exist today. We were referred to reg. 10 of the Elections (Registration of Electors) Regulations 2002 ("the Elections

Regulations") which stipulates that the electoral roll must be revised every three months. It is an ongoing process. We reproduce below the provisions of reg. 10:

> 10 (1) The electoral roll prepared under the Elections (Registration of Electors) Regulations 1971 [P.U. 326/1971], the Elections (Registration of Electors) Regulations (Sarawak) 1971 [P.U. (A) 327/1971] and the Elections (Registration of Electors) (Sabah) 1971 [P.U. (A) 328/1971] and certified by the Election Commission on or before 31 December 2001 become the principal electoral roll under these Regulations.
>
> (2) For the purposes of revision, the Registrar shall, every three months, prepare a list of the names of electors from the principal electoral roll who have died or have become disqualified for registration and the Registrar shall update the principal electoral roll by deleting the names of electors who have died or have become disqualified for registration.

**[59]** Learned counsel for the Selangor Government took issue with this statement from the Bar table by the learned Senior Federal Counsel and insisted that the assertion must be averred to by way of affidavit evidence. We have pondered over the matter and we do not think it is necessary for the Election Commission to affirm an affidavit to confirm what the learned Senior Federal Counsel told the court.

**[60]** In the first place, the real issue in the judicial review application is the effect in law of the Election Commission's act of using an electoral roll that did not contain the addresses of the 136,272 voters, as pleaded in ground 7.3 of the Order 53 Statement. The issue concerning the 2003 and 1994 locality code and locality name of the voters was an issue that was raised for the first time in the course of the exchange of affidavits between the parties. It is certainly not the ground on which the Selangor Government's case is based to challenge the legality of the 2016 delimitation exercise.

**[61]** Secondly, the learned Senior Federal Counsel's explanation on the non-availability of the locality code is reasonable and consistent with what reg. 10 of the Elections Regulations stipulates. There is no reasonable ground for believing that there has been a breach of public duty on the part of the Election Commission in failing to keep the locality code. We venture to say that it is unreasonable to expect the Election Commission to keep an electoral roll and locality code that were used for the delimitation exercises carried out decades ago.

**The Law And Legal Principles Applicable**

**[62]** As for the applicable law on discovery in a judicial review application, O. 53 r. 6 of the Rules, which empowers the court to grant discovery (and cross-examination) in such application, is couched in the following language:

After leave has been granted, any party to an application for judicial review may apply to the Judge for discovery and inspection of documents pursuant to Order 24, to administer interrogatories pursuant to Order 26, or to cross examine the deponent of any affidavit filed in support of or in opposition to the application pursuant to Order 38.

**[63]** Order 24 referred to in O. 53 r. 6 above, of which rr. 12 and 13 are directly relevant, stipulates as follows:

Order 24

Order for production to Court (O. 24, r. 12)

12(1) At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter that falls within one of the following descriptions:

(a) Documents on which the party relies or will rely;

(b) Documents which could –

(i) adversely affect a party's case; or

(ii) support a party's case; and

(c) documents which may lead to a series of enquiry resulting in the obtaining of information which may –

(i) adversely affect a party's case; or

(ii) support a party's case.

(2) The Court may deal with the documents when produced in pursuance of an order made under paragraph (1) in such manner as it thinks fit.

Production to be ordered only if necessary (O. 24, r. 13)

13(1) An order for the production of any documents for inspection or to the Court shall not be made under any of the foregoing rules unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

(emphasis added)

**[64]** The legal principles upon which discovery can be ordered in judicial review proceedings had been explained by this court in *Rekapacific Bhd v. Securities Commission & Anor And Other Appeals* [2005] 2 CLJ 108; [2005] 2 MLJ 269 where Gopal Sri Ram JCA (as he then was) delivering the judgment of the court noted that the current practice in England after the amendment to their Order 53 is set out at pp. 254-257 of Richard Gordon's work *Judicial Review and Crown Office Practice*, which he described as the *locus classicus* on the subject. He then quoted (*in extenso*) the following observations by the learned author:

Discovery and inspection

Parties seeking discovery and inspection may experience more difficulty than in an ordinary action, notwithstanding the incorporation of O. 24 into judicial review proceedings. Whereas in most actions discovery occurs automatically under O. 24, rr. 1 and 2 **there is no inherent right, in applications for judicial review, to orders for discovery or inspection.**

The retention of control by the court may indicate that such orders will be more difficult to obtain in cases under O. 53. Certainly this was the view of the Court of Appeal in *R v. Secretary of State for the Home office, ex p Harrison* (unreported, 10 December 1987) where it was stated that an application for judicial review discovery would be appropriate in fewer cases and was likely to be more circumscribed.

In general, the following principles appear to govern the grant or refusal of discovery under O. 53:

(a) Discovery will **not be ordered so as to make good defects in the applicant's evidence** (*R v. Inland Revenue Commissioners, ex p Taylor* [1988] 1 COD 61; *R v. Secretary of State for Education, ex p J* [1993] 1 COD 146; *R v. Inland Revenue Commissioners, ex p National Federation of Small Employed and Small Businesses Ltd* [1982] AC 617 at p 635H).

(b) One will seldom obtain full private law type discovery in a *Wednesbury* challenge (*R v. Secretary of State for the Environment, ex p Smith* [1988] COD 3).

(c) By contrast, discovery will be ordered under O. 53 **where it is required so that the justice of the case may be advanced and where it is necessary for disposing fairly of the matter** (within the meaning of O. 24 r. 8) (see *R v. Inland Revenue Commissioners, ex p J Rothchild Holdings Plc* [1987] 1 DSTC 163; *R v. Governor of Pentonville Prison, ex p Herbage (No 2)* [1987] 1 QB 1077).

(d) Discovery will also be ordered to go behind the contents of affidavits if there was some matter before the court which suggested that the contents of the affidavits were not accurate (*Re H, The Guardian*, 17 May 1990). **By contrast, discovery will not be ordered where there is no reason to doubt the *bona fides* or accuracy of the reasons given on affidavit** (see *R v. Secretary of State for the Environment, ex p Islington LBC* [1992] COD 67; *R v. Secretary of State for Health, ex p LB of Hackney* [1994] 1 COD 432).

The most authoritative pronouncement remains that of Lord Scarman in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at p 654. In relation to discovery under O. 53 he indicated that: … Upon general principles, discovery should not be ordered unless and until the court is satisfied that the evidence reveals **reasonable grounds for believing that there has been a breach of public duty**; and it should be limited strictly to **documents relevant to the issue** which emerges from the affidavits.

The second limb of this statement is unexceptionable. It is a guiding rule that discovery and inspection must be restricted to matters relevant to an existing dispute. Indeed, in judicial review proceedings it has been held that discovery must be central to the application (see *R v. Secretary of State for the Home Department, ex p Benson* [1989] COD 329).

It is, however, questionable whether, as a preliminary requirement, the court must attempt an evaluation of merits. Interlocutory relief will be granted only after leave has been given to apply for judicial review. In that sense therefore an applicant seeking discovery has, *ex hypothesi*, an arguable case for asserting a breach of public duty. In *R v. Secretary of State for Transport, ex p ABH Road Safety Ltd* [1993] COD 150, Schiemann J left open the possibility that, in an appropriate case, the grant of leave in judicial review may sometimes be taken to establish a *prima facie* ground of irrationality, thereby justifying an order for discovery. Certainly, following the grant of leave, it is difficult to see what else the court can do when considering discovery/inspection beyond determining whether potentially discoverable documents are relevant to the issues between the parties.

Given the two-stage procedure under O. 53 it may be that Lord Scarman was merely emphasising the overall hurdles to be surmounted before discovery could become available. *Even if these hurdles are surmounted the doctrine of public interest immunity would appear to have more scope, having regard to the nature of the judicial review, as a means of opposing an order for discovery in O. 53 proceedings.*

(emphasis added)

**[65]** As for the elements required to be shown for the grant of an order for discovery, the then Supreme Court in *Yekambaran Marimuthu v. Melayawata Steel Berhad* [1994] 2 CLJ 581 through Edgar Joseph Jr SCJ had this to say:

The essential elements for an order for discovery are threefold; namely, first there must be a **"document"**, secondly, the document must be **"relevant"** and thirdly, the document must be or have been in the **"possession, custody or power"** of the party against whom the order for discovery is sought.

It is indisputable, that the items of which discovery is sought are documents and they are in the possession, custody or power of the defendant and nothing more need be said about this.

**As to "relevance", our Rules of the High Court limit discovery to documents which are "relevant to" or "relate" to the factual issues in dispute.**

More particularly, the discovery obligation applies to documents "relating to matters in question in the action" (Rules of the High Court, O. 24, r. 1(1) or "relating to any matter in question in the cause or matter" (O. 24 r. 3(1)). In practice, the relevance is primarily determined by reference to the pleadings but there need not be a pleading for a matter to be said to be in issue. (See *Phillips v. Phillips* [1879] 40 LT 815, 821). (emphasis added)

A **Application Of The Law To The Facts**

**[66]** Juxtaposed with the facts of the present case, how does the law fit in to favour the Selangor Government's prayer for discovery of the locality code and locality name of the 136,272 voters that the Election Commission used for the 2003 and 1994 delimitation exercises?

B

**[67]** At the risk of being repetitive, we must, first of all, reiterate that the main issue before the court is whether the Election Commission acted unlawfully when it carried out the 2016 delimitation exercise (not the 2003 and 1994 exercises) by using an electoral roll that did not have the addresses of the 136,272 voters.

C

**[68]** In this regard, it is important to bear in mind that the Selangor Government's pleaded case was never about the non-availability of the locality code and locality name of voters used during the 2003 and 1994 delimitation exercises. It was also never the Selangor Government's pleaded case that the 2016 delimitation exercise was unlawful because the electoral roll did not contain the locality code and locality name of the 136,272 voters used during the 2003 and 1994 delimitation exercises. The Selangor Government's case all along has only been about the missing addresses on the electoral roll that was used during the 2016 delimitation exercise.

D

E **[69]** The electoral roll with the missing addresses of the 136,272 voters used during the 2016 delimitation exercise is the real dispute between the Selangor Government and the Election Commission, as pleaded in ground 7.3 of the Order 53 Statement. We must not be sidetracked by side issues. For ease of reference, we reproduce again ground 7.3 of the Order 53 Statement:

F

> 7.3 used the electoral roll which is defective as approximately 136,272 voters in the State of Selangor shown on the electoral roll do not have their corresponding addresses entered on the roll.

**[70]** Necessity and not fairness is the prime concern of the court in an G application for discovery: See *Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40 where this court held as follows:

> The test is necessity not fairness and it is for the applicant to satisfy the court, see *Dolling-Baker*'s case and *Ventouris v. Mountain*. Because of that H erroneous premise the learned judge appeared to be more concerned with relevance and fairness and omitted to consider whether and why it was necessary for the order to be made.
>
> If necessity is not the prime concern of the court, allowing discovery would tantamount to allowing the respondents to fish for evidence which I defeats the purpose of the rule by causing the appellants to suffer unfair disadvantage if they fail to comply with an order which is oppressive and incapable of compliance – see *Taylor v. Anderton and Leslie S Holmes.*

**[71]** To entitle the Selangor Government to an order for discovery of the locality code and locality name of the 136,272 voters, it must be shown that there are essentially or fundamentally important questions of fact that are in serious dispute, as decided in *Rekapacific (supra)*. This is what Gopal Sri Ram JCA (as he then was) said in this regard:

> The second point that needs to be made – and made quite emphatically – is that it is only in very rare cases that **either cross-examination or discovery or both** should be permitted in judicial review proceedings. This is because questions of fact are rarely in dispute in judicial review proceedings. Of course, **if there are any essential or fundamentally important questions of fact that are in serious dispute** then the judicial review court would be entirely justified in ordering cross-examination to enable it to make the relevant finding of fact. (emphasis added)

**[72]** The question that called for our consideration was whether there is any essentially and fundamentally serious question of fact that is in serious dispute between the Selangor Government and the Election Commission in relation to the 2016 delimitation exercise that warrants discovery of the documents sought for in prayer 1A(iii). From the Selangor Government's perspective and pleaded case, the dispute is over the missing addresses of the 136,272 Selangor voters from the electoral roll.

**[73]** We must say at the outset that the missing addresses does not even qualify as a dispute, let alone a serious dispute on an essentially and fundamentally important question of fact that warrants discovery of the locality code and locality name of the 136,272 voters that the Election Commission used in carrying out the 2003 and 1994 delimitation exercises.

**[74]** In the first place, the addresses are not in the Election Commission's possession and the Selangor Government itself has confirmed that it does not need the addresses for the substantive hearing. It is therefore futile to argue that the locality code and locality name of the voters used during the 2003 and 1994 delimitation exercises would provide valuable information that may prove or disprove either party's contentions at the substantive hearing.

**[75]** Consequently, it was and still is unnecessary for an order of discovery to be made in respect of the locality code and locality name that was used more than 20 years ago. The only issue before the High Court at the substantive hearing would be whether, without the locality code and locality name of the voters used during the 2003 and 1994 delimitation exercises, the 2016 delimitation exercise had been rendered unlawful when Election Commission used an electoral roll that did not have the addresses of the 136,272 voters.

**[76]** Secondly, the locality code and locality name of the 136,272 voters that the Election Commission used to carry out the 2003 and 1994 delimitation exercises is already out of the Election Commission's possession and it has not been shown that the Election Commission is required by law to keep the locality code and locality name after the 136,272 voters had been assigned their localities at the point of registration.

**[77]** In *Kerajaan Negeri Kelantan v. Petroliam Nasional Bhd & Other Appeals* [2014] 7 CLJ 597; [2014] 6 MLJ 31, the Federal Court held that the underlying principle which underscores the discovery process is that it must be predicated on the issues involved in a particular case. In the present case, the application for discovery of the locality code and locality name was clearly not predicated on the issue involved, which is whether the missing addresses had tainted the 2016 delimitation exercise, given that the prayer for discovery of the addresses of the 136,272 voters had been withdrawn.

**[78]** The law further requires that the documents sought to be discovered must be in the other party's possession before an order for discovery can be issued: *Yekambaran Marimuthu* (*supra* at para. 65). Since the locality code and locality name for the 2003 and 1994 delimitation exercises is not in the Election Commission's possession, the High Court was in no position in any event to allow prayer 1A(iii), which was to compel the Election Commission to furnish the locality code and locality name for purposes of the substantive judicial review hearing.

**[79]** To recapitulate, the missing addresses of the 136,272 voters on the electoral roll is a non-issue with the withdrawal of prayer 1A(i), the Election Commission does not have the locality code and locality name used for the 2003 and 1994 delimitation exercises, and the Election Commission has admitted that there are mistakes in the change of localities in some cases.

**[80]** The question to ask is whether these complaints constitute disputes of fact, and if so whether they can only be resolved by way of discovery of the locality code and locality name used during the 2003 and 1994 delimitation exercises. We do not think so. In our view, all these are not disputes of fact, let alone serious disputes on essentially and fundamentally important questions of fact. Surely, facts that are not in dispute cannot constitute facts in dispute. This is to state the obvious.

**[81]** There is therefore nothing for the court to resolve by way of discovery as the addresses of the 136,272 voters are not needed, the locality code and locality name of the 136,272 voters used for the 2003 and 1994 delimitation exercises is not in the Election Commission's possession, and mistakes in changing the localities of some of the voters had been admitted by the Election Commission.

**[82]** Given the factual matrix of the case, all that the High Court needs to resolve at the substantive hearing is purely a question of law, ie, whether the application for judicial review ought to be allowed on the ground that the Election Commission acted contrary to law, unconstitutionally, unreasonably and irrationally when it carried out the 2016 delimitation exercise by using an electoral roll that was defective in that it did not contain the addresses of the 136,272 Selangor voters.

**The Application For Cross-examination**

**[83]** As for the application to cross-examine the Chairman of the Election Commission, the principles applicable are the same as those that are applicable in an application for discovery: *Rekapacific (supra)*. Cross-examination of deponents of affidavits in judicial review applications are seldom allowed for reasons stated by Lord Diplock in *O'Reilly v. Mackman* [1983] 2 AC 237 at p. 282:

> … and to applications for cross-examination of deponents to affidavits Ord. 28, r. 2(3) applies. This is the rule that deals with evidence in actions begun by originating summons and permits oral cross-examination on affidavit evidence wherever the justice of the case requires. It may well be that for the reasons given by Lord Denning MR in *George v. Secretary of State for the Environment* (1979) 77 L.G.R. 689, it will be upon rare occasions that the interest of justice will require that leave be given for cross-examination of deponents on their affidavits in applications for judicial review. This is because of the nature of the issues that normally arise upon judicial review. The facts, except where the claim that a decision was invalid on the ground that the statutory tribunal or public authority that made the decision failed to comply with the procedure prescribed under the legislation under which it was acting or failed to observe the fundamental rules of natural justice or fairness, can seldom be a matter of relevant dispute upon an application for judicial review, since the tribunal or authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers …

**[84]** The application to cross-examine must satisfy the three primary considerations as set out by this court in *Tetuan Kumar Jaspal Quah & Aishah v. The Co-operative Central Bank Ltd* [2007] 4 CLJ 487; [2007] 4 MLJ 638:

> Firstly, the truth of the averment in the affidavit must be challenged or the issues of fact identified. Secondly, cross-examination should only be allowed if the disputed fact is relevant to the issue to be decided and must be limited to that issue only. And thirdly, cross-examination would not advance the cause of justice and should be refused if there is sufficient evidence or contemporaneous documents to enable the court to properly decide without the need for cross-examination.

**[85]** All three conditions must be satisfied cumulatively and not alternatively: *Tun Dr Mahathir Mohamad & Ors v. Datuk Seri Mohd Najib Tun Hj Abdul Razak (No 2)* [2017] 8 CLJ 350; [2016] 11 MLJ 1, per Abu Bakar Jais J. In *Paruvathy Palany v. Sathiasealan Govindasamy* [1999] 6 CLJ 113; [1999] 5 MLJ 151, Abdul Malik Ishak J (as he then was) held as follows:

> Of pertinence to note would be the principle of law gleaned from the case of *Shea v. Green* [1886] 2 TLR 533 which states that the court may refuse to act on an affidavit where the deponent cannot be cross-examined. Then there is the principle of law which states that where there is a question of motive or of good faith of a deponent, the court ought not to be asked to act without cross-examination (*Re Smith and Fawcett Ltd* [1942] Ch 304). The court certainly has a discretion to allow a party to cross-examine a deponent. Chan Sek Keong J in *Tang Choon Keng Realty (Pte) Ltd & Ors v. Tang Wee Cheng* [1992] 2 SLR 1114 succinctly said at p 1142 of the report that '… in an action tried on affidavits a party who has sworn an affidavit may be subject to being cross-examined on it.

**[86]** Allegations of bad faith on the part of the decision-maker may also have to be investigated by cross-examination: See *Judicial Remedies in Public Law* (5th edn) by Clive Lewis at p. 363.

**[87]** The Selangor Government's complaint against the Election Commission was over the destruction of the addresses and voter registration documentation of the 136,272 voters. It was submitted that it was improper for the Election Commission to have done so.

**[88]** It was pointed out that there is a grave inconsistency in the Election Commission's averment that the documents had been destroyed, as the following would show:

(i) The Election Commission's Sistem Semakan Isi Rumah itself clearly suggests that voters can check their addresses online and even apply to change their addresses if there is any error. Learned counsel questioned how this would be possible if the Election Commission now states that it had destroyed the addresses of all voters who registered prior to 2002 before the migration to the computer system, which includes the 136,272 voters;

(ii) The Sistem Semakan Isi Rumah to date contains the addresses of voters registered before the migration to the computer system in 2002;

(iii) The Election Commission previously averred that it does possess at least some of the addresses of voters registered before the migration to the computer system in 2002. It was pointed out that the Election Commission appears to have adopted a completely different position now by making a blanket statement that all the addresses pre-2002 had been destroyed; and

(iv) The Election Commission itself averred that "… sebelum seseorang itu boleh didaftarkan sebagai pemilih, ia akan melalui proses ketat dengan mempamerkan nama-nama dan alamat yang diberikan oleh pemilih-pemilih tersebut sendiri untuk maksud bantahan oleh pihak-pihak berkenaan". According to learned counsel, it would be very unusual if the Election Commission does not possess documentation of a process that it deems so stringent.

**[89]** Reference was made to the following passages in *R (Quark Fishing Ltd) v. Secretary of State for Foreign Affairs and Commonwealth Affairs* [2002] EWCA Civ 1409:

> 50. Mr Parker submits, correctly, that there is no duty of general disclosure in judicial review proceedings. However there is – of course- a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. The real question here is whether in the evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in the case were arrived at. If the court has not been given a true and comprehensive account, but has had to tease the truth out of late discovery, **it may be appropriate to draw inferences against the Secretary of State upon points which remain obscure:** see *Padfield* [1968] AC 997, per Lord UpJohn at 1061G – 1062A. (emphasis added)

**[90]** It was argued that the Election Commission must keep all the historical records or addresses of the voters and that it was incumbent on them to retain copies of the addresses. It was alleged that the Election Commission was not forthcoming on this vital information.

**[91]** It was further contended that if the Election Commission fails to answer these questions, then this would provide the basis for the Selangor Government's application to cross-examine the Chairman of the Election Commission in connection with the destruction of the documents.

**[92]** Learned counsel went on to submit that from the evidence filed, it is clear that there are several disputes of fact warranting resolution by cross-examination of the Election Commission Chairman. Such disputes of fact include:

(i) Why, when and how did the Election Commission destroy information as important as the addresses of at least 136,272 voters in the State of Selangor and whether they nonetheless maintained in other formats and where it is stored; and

(ii) Whether the localities of voters have been arbitrarily changed by the Election Commission without any change of addresses or application being made by the voters themselves, and the extent of such discrepancy.

**[93]** It was submitted that these issues revolve around the question whether the Election Commission had conducted itself in good faith or had acted *mala fide* in the exercise of its power, which is a strong consideration for allowing cross-examination in a judicial review.

**[94]** What is clear from the argument is that the application to cross-examine the Election Commission Chairman is grounded on the missing addresses of the 136,272 voters, the same ground that it relied on in applying for discovery of the locality code and locality name of the voters. We have said enough on the address issue when dealing with the application for discovery and we do not propose to repeat them, save to say that having regard to the principles applicable, the learned judge was right in disallowing the prayer for cross-examination.

**The Exercise Of Discretion**

**[95]** In deciding the way we did, we were mindful of the fact that these appeals concern the exercise of a discretion by the learned judge. It was urged upon us by learned counsel not to disturb the High Court's decision as it is trite law that an appellate court would be slow to interfere with the discretion of the judge of the first instance, especially with regard to interlocutory matters. Reliance was placed on *ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors* [2013] 1 LNS 99; [2013] 3 MLJ 35 where this court held:

> (a) it is well settled that the appellate court will not ordinarily interfere with the exercise of discretion of a trial court in relation to procedural and/or interlocutory matters (see *Davy v. Garrett* (1878) 7 Ch D 473);
>
> (b) the appeal relates to an interlocutory procedural order and exercise of discretion. It is well settled that in an appeal against the exercise of discretion by a judge, the initial function of the appellate court is one of review only, there being no original discretion vested in the appellate court. It is for the appellant to demonstrate that an error in the exercise of discretion has indeed occurred and it is also one of the categories of cases where appellate interference is warranted (see *Wah Bee Construction Engineering v. Pembenaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858; *Majlis Peguam Malaysia & Ors v. Raja Segaran a/l S Krishnan* [2002] 3 MLJ 155);

**[96]** The correct approach to be adopted by an appellate court in dealing with the exercise of such discretion has been explained by Lord Guest delivering the judgment of the Privy Council in *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 1 MLJ 228, a decision on appeal from Malaysia, in the following terms at p. 229:

> The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co. v. Johnston* per Lord Wright at 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v. Bartlam*).

**[97]** There are, therefore, two situations where the exercise of the discretion can be assailed on appeal:

(a) Where the discretion has been exercised on a wrong principle and should have been exercised in a contrary way; or

(b) Where there has been a miscarriage of justice occasioned by the exercise of the discretion.

**[98]** Other than these two situations, the exercise of the discretion must not ordinarily be disturbed on appeal as the presumption is that the judge has rightly exercised his discretion. For reasons that we have given, and with due respect to the learned judge, we were of the view that he had acted on a wrong principle in allowing the Selangor Government's application for discovery of the locality code and locality name that was used for the 2003 and 1994 delimitation exercises.

**Conclusion**

**[99]** It was for all these reasons that we allowed the appeal by the Election Commission and dismissed the appeal by the Selangor Government.